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JUN 04 2007

In re Application of: :  
MCCONNELL, DANIEL L., et al. :  
Serial No. 09/832,718 :  
Filed: April 11, 2001 :  
Docket: 069035.00001 :  
Title: PORTABLE PERSONAL WIRELESS :  
INTERACTIVE VIDEO DEVICE AND :  
METHOD OF USING THE SAME :  
DECISION ON PETITION

This is a decision on the petition filed on January 10, 2005. Petitioner is requesting withdrawal of the abandonment and reinstatement of the appeal under 37 CFR 1.181. Alternatively, should the petition under 37 CFR 1.181 be dismissed, the petitioner is requesting that it be treated, alternatively, under 37 CFR 1.137(b).

The petition is dismissed.

Initially, it is pointed out that the petition requests two different forms of relief. This is impermissible under 37 CFR § 1.4(c). This decision will only address the issues under 37 CFR § 1.181. No fee is required under this section.

Background

A Notice of Appeal was filed on June 04, 2004 and an Appeal Brief was filed on August 02, 2004 under 37 CFR § 1.192. A Notification of Non-Compliance With 37 CFR § 1.192(c) was mailed on August 24, 2004. Applicants responded with a new Appeal Brief filed September 02, 2004 under 37 CFR §1.192. A second Notification of Non-Compliance With 37 CFR § 1.192(c) was mailed November 26, 2004 in which it was pointed out that the new brief failed to correct the defect noted in the first Notification with respect to why claims separately argued are separately patentable. In view of this, the examiner concurrently dismissed the appeal. This has resulted in the abandonment of the application. Petitioner contends the dismissal was improper since the new appeal rules under 37 CFR 41.37 went into effect September 13, 2004 and supersede 37 CFR § 1.192, and the examiner's second Notification was mailed after this date. Since 37 CFR §1.41 does not require a statement as to why claims separately argued are separately patentable, petitioner reasons that the dismissal is improper.

Discussion and Decision

MPEP 1205.02 (REV. 3, August 2005) states that “any brief filed … before September 13, 2004 must comply with either 37 CFR § 1.192 or 37 CFR § 41.37.” Page 1 of the Appeal Brief filed September 02, 2004 clearly states “APPELLANT'S BRIEF UNDER 37 CFR 1.192”. A review of this brief clearly indicates that applicants were continuing their appeal under 37 CFR § 1.192.

From MPEP 1206 (Rev. 1, Feb. 2000), 37 CFR 1.192(c)(7) and (d) are reproduced:

(7) *Grouping of claims.* For each ground of rejection which appellant contests and which applies to a group of two or more claims, the Board shall select a single claim from the group and shall decide the appeal as to the ground of rejection on the basis of that claim alone unless a statement is included that the claims of the group do not stand or fall together and, in the argument under paragraph (c)(8) of this section, appellant explains why the claims of the group are believed to be separately patentable. Merely pointing out differences in what the claims cover is not an argument as to why the claims are separately patentable. [Emphasis added.]

(d) If a brief is filed which does not comply with all the requirements of paragraph (c) of this section, appellant will be notified of the reasons for non-compliance and provided with a period of one month within which to file an amended brief. If appellant does not file an amended brief during the one-month period, or files an amended brief which does not overcome all the reasons for non-compliance stated in the notification, the appeal will stand dismissed. [Emphasis added.]

In view that the second brief failed to comply with 37 CFR § 1.192(c)(7), in accordance with 37 CFR § 1.192(d), the appeal was properly dismissed.

**PETITION DISMISSED.**

Petitioner is again reminded that this decision does not address the abandoned status of the application because to do so would contravene the requirement of 37 CFR § 1.4(c), which the undersigned is without authority to waive. A petition to revive under 37 CFR § 1.137, including the required fee, should be separately filed and directed to the Office of the Deputy Commissioner for Patent Examination Policy at Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450. See MPEP 1002.02.

It is to be noted that the third brief filed concurrently with the present petition of January 10, 2005 does not include an evidence appendix and a related proceeding appendix as set forth in 37 CFR § 41.37(ix) and (x). While the brief may be acceptable as is, see MPEP 1205.03, applicants may desire to take the opportunity to correct this omission with the filing of a petition to revive.

Any inquiry regarding this decision should be directed to Allan N. Shoap, Special Program Examiner, at (571) 272-4514.

Karen M. Young  
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